LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 23 1963
JOHN F. DAVIS, CLERK

No. 633

Supreme Court of the United States

OCTOBER TERM, 1963.

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

REPLY MEMORANDUM OF PETITIONER

DEAN ACHESON,
701 Union Trust Building,
Washington, D. C.

C. RAY ROBINSON,
550 Kearney Street,
San Francisco, California,

Attorneys for Petitioner.

December 23, 1963

Supreme Court of the United States

OCTOBER TERM, 1963

No. 633

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, ET AL., *Respondents*.

REPLY MEMORANDUM OF PETITIONER

Petitioner will not burden the Court with a lengthy reply. Certain of the arguments made by respondents in opposition, however, merit brief comment:

I.

The Brief for Respondents in Opposition argues (at p. 9) that there is no occasion for this Court to review the decision of the Court below that certain absent persons were indispensable parties defendant because "the opinion of the Court shows that its judgment is supported by other independent grounds: viz., that petitioner has no claim, and that any claim it may ever have had is barred by limitations."

As we have earlier demonstrated, the first of the two "other independent grounds" referred to, that petitioner may not seek recovery on account of the wrongs set forth in the complaint because some of the wrongdoers gained for a time legal title to all of petitioner's stock as trustees and "consented" to their own wrongs

by failing to sue themselves, is in fact not an independent ground at all. The reason that this Court will not review one ground of a decision resting on more than one truly independent ground is that under such circumstances review can be no more than advisory, and can have no practical consequences in the particular litigation. Here, in contrast, as we have shown in our Petition for Certiorari, reversal of the Court of Appeals' plainly erroneous ruling on the issue of indispensable parties will have specific practical consequences, in opening for the first time a course heretofore closed by that ruling—an application to substitute petitioner's trustees or beneficiaries as plaintiffs in this action. Such substitution has heretofore been impossible because those trustees and most of those beneficiaries are citizens of California, and the persons determined by the courts below to be indispensable parties defendant are also citizens of that state, so that substitution would necessarily have destroyed the diversity jurisdiction of the District Court.

The second "independent ground" of decision below to which respondents advert—that any claim of petitioner is barred by limitations—is not in fact suggested in the opinion of the Court of Appeals. In any event, even had that Court advanced such a ground of decision, it would plainly have been merely a restatement of the proposition just discussed, that the "consent" of the wrongdoing trustees to their own wrongs bars recovery by petitioner. For it was only these wrongdoers, and not petitioner's beneficial owners, who had any knowledge of the wrongs complained of prior to 1954, and even if their knowledge could have caused the statute of limitations to continue to run against petitioner,

it would plainly not have had that result as to petitioner's present trustees and beneficiaries who were altogether innocent of any knowledge. Here again, in the circumstances of this case any such ground of decision would not have been a truly independent and alternative one barring review by this Court of the determination as to indispensable parties. For here again a reversal of the latter determination would for the first time open the way to a substitution of plaintiffs as to whom any ruling that petitioner itself is barred by limitations could not apply.

II.

Respondents attempt to make much of the fact that no effort was made below to substitute petitioner's trustees or beneficiaries as parties plaintiff in petitioner's stead. The fundamental fallacy in this line of argument is that the determination of the courts below that certain citizens of California were indispensable parties defendant made any attempt at such substitution impossible, since, as above recited, the only persons who could have been substituted as plaintiffs are also California citizens so that substitution would have destroyed diversity jurisdiction. Only after the determination made below as to California indispensable parties defendant is set aside will there arise, *for the first time*, an opportunity to seek substitution of California parties plaintiff.[1]

[1] Respondents state that "the question on substitution * * * need not be decided by this Court", but nevertheless go on to make a labored attempt to demonstrate that the District Court should not allow substitution in the circumstances here presented. We heartily agree that the question on substitution need not, and should not, be decided here. That is obviously a question to be determined in the first instance by the District Court. What petitioner here seeks is simply an opportunity to present the question to that Court.

Finally, respondents argue that review can have no practical consequences because substitution would in any event have to be denied on the ground that the presence of California plaintiffs would destroy diversity jurisdiction, because many of the presently named defendants, and also J. Leroy Nickel, Jr., held below to be an indispensable party defendant, are also California citizens. The short answer to this suggestion is that once the indispensable parties ruling made below has been reversed, it will be possible to dismiss as defendants all those that are citizens of California, and to proceed against the remaining defendants for at least partial redress of the grievances for which they are responsible.[2]

Respectfully submitted.

DEAN ACHESON,
701 Union Trust Building,
Washington, D. C.

C. RAY ROBINSON,
550 Kearney Street,
San Francisco, California.

December 23, 1963 *Attorneys for Petitioner.*

[2] The Brief of Respondents Trico Oil and Gas Company and Gene Reid Drilling, Inc., in Opposition appears to urge that the judgment below is supportable on the additional ground that certain citizens of Nevada, not subject to the jurisdiction of the District Court, are indispensable parties to this action. Neither the opinion of the District Court nor that of the Court of Appeals suggests reliance by those courts on any such proposition. In any event, it is clear that the argument as to the indispensability of those persons is premised solely on their relationship to Trico Oil and Gas Company and Gene Reid Drilling, Inc. Because the latter two corporations are California citizens, a substitution of plaintiffs in the District Court will have to be accompanied by their dismissal as defendants. And when this is done, the contention that others are indispensable co-defendants with them will be rendered moot.